79-1418

Supreme Court, U. S.
FILED
MAR 13 1980
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1979

No. .....

GLOBE PAPER COMPANY,
Petitioner,

vs.

EDGAR L. LINDLEY,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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Supreme Court of the United States

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No. .....

GLOBE PAPER COMPANY,
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vs.

EDGAR L. LINDLEY,
Tax Commissioner of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Petitioner, Globe Paper Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Ohio, Eighth Appellate District, entered in this matter on August 9, 1979. The final orders of the Supreme Court of Ohio dismissing Petitioner's appeal and denying Petitioner's motion for an order directing the Court of Appeals to certify its record to the Supreme Court of Ohio were entered on December 14, 1979. This Petition, therefore, is filed within Ninety Days of the Supreme Court of Ohio's denial of discretionary review.

OPINIONS BELOW

The final orders of the Supreme Court of Ohio are appended hereto on pages A1 and A2 of the Appendix. The journal entry and opinion of the Court of Appeals for the Eighth Appellate District of Ohio is printed in the Appendix at page A3. The journal entry of the Board of Tax Appeals is printed in the Appendix at page A15. The journal entry of the Tax Commissioner of Ohio is printed in the Appendix at page A30.

JURISDICTION

The final orders of the Supreme Court of Ohio were entered on December 14, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED FOR REVIEW

Whether the taxing authorities of Ohio have so impaired the notice and hearing rights accorded the taxpayer in a sales tax assessment proceeding as to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1, Fourteenth Amendment to the Constitution of the United States:

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes involved are Ohio Rev. Code §§ 5717.02, 5739.02(B)(15) and 5739.03 and can be found in the Appendix at page A36.

STATEMENT OF THE CASE

The State of Ohio imposes a sales tax on all retail sales[1], except sales established by the taxpayer as being subject to one of the many exemptions provided by statute.[2]

Exemption may be established by the taxpayer's obtaining, at the time of sale, certificates of exemption attesting to the consumer's exempt status or use.[3]

In our case, however, the Taxpayer made a number of exempt sales without obtaining certificates of exemption. In the absence of certificates of exemption, the Ohio statute provides that a taxpayer is entitled to notice and a 60-day

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1. The taxpayer liable for payment of the sales tax to the State is the vendor, but the vendor is authorized to collect the tax from the consumer.

2. *E.g.*, in our case the taxpayer is a vendor of paper packages and packaging materials, and Ohio Rev. Code § 5739.02(B)(15) provides an exemption on sales of "packages . . . and material for use in packaging tangible personal property produced for sale, or sold at retail."

3. Ohio Rev. Code § 5739.03 provides in pertinent part:

"If any sale is claimed to be exempt . . . the vendor must obtain from the consumer a certificate specifying the reason that the sale is not legally subject to the tax."

period within which to establish exemption before the levying of any assessment for sales tax.[4]

A taxpayer is strictly limited to 60-days for establishing exemption, as has been made abundantly clear in a line of Ohio court decisions holding the taxpayer bound by the record established before expiration of the 60-day period and barring consideration of any proof introduced thereafter.[5]

The 60-day procedure provided by statute for establishing exemption does not, in itself, run afoul of any rights guaranteed a taxpayer under the United States Constitution. Rather, it is the routine practices of the Ohio Department of Taxation in implementing the 60-day statute which contravene the due process requirements of notice and hearing under the Fourteenth Amendment. This is well-illustrated by the Taxation Department's practices in our case.

A sales tax assessment proceeding in Ohio involves four steps as follows:

First is the 60-day period for establishing exemption, which is initiated by the Taxation Department's Official Notice of Intention to Levy a Sales and Use Tax Assessment (known as the "60-day letter").

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4. Ohio Rev. Code § 5239.03 provides in pertinent part:

> If no certificate is . . . obtained within the period for filing the return for the period in which such sale is consummated, it shall be presumed that the tax applies. The failure to have . . . so obtained a certificate shall not prevent a vendor or consumer from establishing that the sale is not subject to the tax within 60 days of the giving of notice by the Commissioner of intention to levy an assessment, in which event the tax shall not apply.

5. The Ohio Appeals Court in our case correctly summarized the applicable rule to be that the taxpayer "is bound by evidence gathered and submitted to the Commissioner within the sixty-day period and, therefore, is precluded from introducing any evidence not furnished during the sixty-day grace period." (Appendix, p. A10)

The second step is an audit of the taxpayer's books and records by the Taxation Department, resulting in the Department's Notice of Assessment.

The third step is a proceeding before a hearing examiner representing the Tax Commissioner, which is convened pursuant to the taxpayer's Petition for Reassessment.

Fourth is an appeal to the Board of Tax Appeals pursuant to the taxpayer's Notice of Appeal, following which appeals are available to a Court of Appeals and the Supreme Court of Ohio.

The first step is critically important to a taxpayer since the time for establishing exemption is strictly limited to 60 days. Yet the notice provided by the 60-day letter (Appendix p. A10) and the proceedings within the 60-day period fall far short of what is minimally required to permit a taxpayer to establish exemption.

The 60-day letter is deficient and even misleading in the notice provided a taxpayer. First, the taxpayer is told of the 60-day period for establishing exemption:

> [Y]ou have 60 days in which to establish that any sales not already covered by valid exemption certificates are not subject to the tax.

Second, the taxpayer is advised what to do during the 60-day period, *i.e.*, obtain written statements of usage from customers:

> A written statement from the purchaser furnishing information concerning exactly how each item involved is used will be given consideration. It is your responsibility to secure this information within the 60 day period. Information received after that time cannot be considered or allowed to establish proof of exemption.

Third, and finally, the taxpayer learns that a Tax Department audit will be conducted "[u]pon expiration of the 60-day period", confined to written documentation consisting of "business records", "valid exemption certificates already approved by our agent", and "satisfactory statements from the purchasers establishing exemption."

Thus the taxpayer's notice in the 60-day letter is limited to notification of an accounting-type, nonadversarial audit procedure.

What the 60-day letter does not tell the taxpayer is anything about the right to a hearing for the presentation of evidence to the Tax Commissioner and the Board of Tax Appeals. Nothing is said in the 60-day letter about the taxpayer's proof being limited at such hearings to evidence developed and existing in admissible form prior to expiration of the 60-day period. Nor is any notice provided that evidence by way of affidavits, depositions, photographs and even videotapes may be preserved within the 60-days for submission at the hearings to follow thereafter. (Much less is there any suggestion as to how a taxpayer would go about noticing and taking depositions in the absence of any adversarial proceedings during the 60-day period.)

Thus the taxpayer receives no notice of the adversarial hearings involved in the tax assessment proceeding after the 60-days expire, nor of the requirement that all evidence be formally marshalled within the 60-day period. In our case, one of the consequences of the inadequate and even misleading nature of the notice provided by the 60-day letter was that Taxpayer referred the matter to its bookkeeper, rather than consulting an attorney before expiration of the 60-day period.

In the 60-day period following the 60-day letter, the Tax Department's practice is that no formal proceedings

take place and no hearing is held to receive evidence—despite the statutory provision that the 60 days is for "establishing that the sale is not subject to the tax" and the Appeals Court's ruling in our case that within "the sixty-day grace period, . . . [the taxpayer] must submit to the Commissioner evidence sufficient to overcome the statutory presumption of taxability set forth in R.C. 5739.03." (Appendix p. A9)

The burden on a taxpayer, therefore, is to submit evidence and establish exemption within a 60-day period during which there is no hearing and no person to receive evidence or to pass on its sufficiency. As a consequence in our case, Taxpayer's oral testimony and exhibits (including actual samples of tax-exempt paper packages and packaging materials) had nowhere to be submitted, and were accordingly not submitted, within the 60-day period.

Abuses commonly occur as the result of the total lack of formal proceedings during the 60-day period. In our case, for example, the tax auditor called on Taxpayer before expiration of the 60-days and encouraged the gathering of untimely exemption certificates, which Ohio law bars from consideration, thus deterring Taxpayer from marshalling admissible evidence. Similar abuses have been noted in other tax assessment cases.[6] While no legal argument can be made against the Ohio courts' refusal to impose estoppel against the State's taxing authority, such abuse does serve to demonstrate that the Taxation Department's practices are a far cry from assuring the appropriate notice and hearing procedures required by due process.

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6. *See, e.g., American Handling Equipment Co. v. Kosydar*, 42 Ohio St. 2d 150, 152-3 (1975), noting "erroneous statements alleged to have been made by appellee's agent, which may have played a part in appellant's failure to get all of the 'letters of usage' within the time prescribed by R.C. 5739.03."

The only hearings ever accorded a taxpayer in a sales tax assessment proceeding are before the Tax Commissioner and then the Board of Tax Appeals. Such hearings can not be said to be at a meaningful time and in a meaningful manner, however, since held long after expiration of the 60-day period, and thus at a time when the taxpayer is precluded from offering evidence and restricted to the record made in the 60-days during which there was neither a hearing nor even a person to receive any proffer of evidence and testimony from the taxpayer.

In our case, Taxpayer was foreclosed at the hearings before the Tax Commissioner and Board of Tax Appeals[7] from presenting evidence which would have been admissible to establish exemption had a hearing been held to receive the evidence during the 60-day period. Specifically, there was a formal proffer of testimony by Taxpayer and its customers, which was rejected by both the Tax Commissioner and Board of Tax Appeals solely because not proffered within the 60-days allowed for establishing exemption. Such testimony was available to be presented within the 60-day period, obviously, had there been a proceeding for its presentation. In addition, photographs of Taxpayer's paper packages and packing materials were rejected as untimely. It is important to note that, while the photographs were prepared after expiration of the 60-days, the packages and materials were themselves available to be introduced as exhibits if there had been an evidentiary hearing within the 60-day period.

The constitutional question in our case was raised as soon as counsel was retained by Taxpayer and was

7. Ohio Rev. Code § 5717.02 provides that "upon the application of any interested party the board shall order the hearing of additional evidence," but this provision is unavailing in a sale tax assessment proceeding by virtue of the 60-day limitation imposed by § 5739.03.

argued at the hearing before the Tax Commissioner and in the assignments of error presented both to the Board of Tax Appeals (Appendix p. A18) and to the Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio (Appendix p. A7).

In affirming the Taxation Department's practices in our case, the Appeals Court specifically held:

—That the denial of a hearing within the 60-day period did not contravene constitutional due process[8];

—That the rejection of evidence and testimony proffered at the only hearings accorded Taxpayer was proper;[9] and

That the hearing before the Tax Commissioner satisfied constitutional due process despite the foreclosure of Taxpayer's presentation of evidence and testimony.[10]

A tax assessment approaching a quarter of a million dollars has accordingly been permitted to stand because Taxpayer "did not submit evidence of tax-exempt status

8. "A hearing before the Commissioner during the sixty-day period at which time the taxpayer may submit the information to establish tax exempt-status is required neither by the statute nor by the Constitutions of the United States or the State of Ohio." (Appendix p. A13)

9. "A taxpayer who neither obtains and furnishes exemption certificates within the period for filing the return for the period in which such sale is consummated, R.C. 5739.03, nor submits evidence of tax-exempt status to the Commissioner within the sixty-day grace period, R.C. 5739.03, is precluded from presenting such material both at the hearing on petition for reassessment before the Commissioner and on further appeal to the Board of Tax Appeals." (Appendix p. A13)

10. "It is at this hearing [before the Commissioner on a petition for reassessment] that the [taxpayer] will have an opportunity to present for the record all of the material in support of his position that the sales were tax-exempt. This is the only hearing provided for by statute and the only hearing required to satisfy due process." (Appendix p. A13)

to the Commissioner within the sixty-day grace period . . . [as] required by R.C. § 5739.03" (Appendix p. A14), even though there was no hearing or other proceeding for the submission of the evidence and testimony available to Taxpayer during the 60-days.

By way of justification, the Appeals Court saw no harm resulting to the taxpayer and rationalized the denial of a hearing during the crucial period, stating that a taxpayer "has available to him a variety of ways in which he may establish that the property is used in an exempt fashion; he may submit affidavits, depositions, photographs or videotapes of the property during the sixty-day period." (Appendix p. A12).[11]

Yet Ohio courts have previously affirmed the rejection of affidavits in tax proceedings as incompetent evidence.[12] More fundamentally there is the lack of notice in the 60-day letter or elsewhere that a taxpayer has any right to a hearing after 60-days and the right within 60-days to marshal and preserve testimony by such procedures as a deposition.[13] The constitutional question of

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11. *See Union Metal Mfg. Co. v. Kosydar*, 38 Ohio St. 2d 53, 56 (n.3) (1974), in which the court noted that "specific evidence" was required, adding:

> The commissioner, in his brief, suggests that 'a creative taxpayer could submit affidavits, depositions, photographs, or even videotapes of the property to establish that the property is used in an exempt fashion.'

12. *See American District Telegraph v. Porterfield*, 15 Ohio St. 2d 92, 96 (1968), affirming the Board of Tax Appeals' exclusion of affidavits from evidence "because there was no opportunity for cross-examination."

13. In commenting in our Reply Brief on the quotation from *Union Metal Mfg. Co. v. Kosydar*, *supra* at fn. 11, we suggested that:

> A taxpayer would have to be more than "creative"—it requires a seer—to understand from this letter that rights exist for serving deposition notices and preserving witness' testimony during the 60 day period, so that such evidence can be submitted at hearings to be held by the Tax Commissioner and BTA after expiration of the 60 days.

the 60-day letter's adequacy as notice was not directly addressed by the Appeals Court's opinion:[14]

The Ohio Supreme Court denied Taxpayer's motion to certify the record of our case, which was based on the ground, *inter alia*, of denial of the due process requirements of notice and hearing under the United States Constitution.[15]

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14. The 60-day letter was held adequate notice against the challenge of the taxpayer in *American Handling Equipment Co. v. Kosydar*, 42 Ohio St. 2d 150 (1975), over the strong dissent of a single justice:

> Giving notice of intention to levy an assessment before the audit is made denies the taxpayer the right to know what the tax agent finds missing and the opportunity to establish that, in fact, no tax is due. Such "notice" is not notice at all, but rather a meaningless administrative pretense at compliance with the statutory requirement. If the taxpayer is foreclosed at the end of 60 days, before the agent has made any investigation to determine what specific transactions may be subject to tax, then the taxpayer is, in fact, being deprived of due process of law because he is being denied the opportunity to present his explanation after a specific claim is made against him.
>
> The General Assembly intended the sales tax statute to be a taxing statute. As the commissioner is using it, it has become a penalty statute, and, as in this case, it is being used in a manner to exact money never rightfully owed, simply because the Tax Commissioner does not give the taxpayer a fair opportunity to defend against specific claims.

42 Ohio St. 2d at 156.

15. The Taxation Department's practices in implementing the 60-day procedure for establishing exemption has been attacked on a variety of grounds in the courts, but no taxpayer has yet been successful in winning a single case.

REASONS FOR GRANTING THE WRIT

A writ of certiorari is sought in our case for the special and important reason that the state courts of Ohio have decided a constitutional due process question of substance not heretofore determined by this Court, and they have decided it in a way probably not in accord with applicable notice and hearing principles established by the decisions of this Court.

The notice and hearing accorded Taxpayer in our case contravene two principles of due process pronounced by this Court.

The first principle is that not only are notice and a hearing required in administrative proceedings, but these fundamental rights must be accorded "at a meaningful time and in a meaningful manner."

Goldberg v. Kelly, 397 U.S. 254, 267 (1970):

> The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. In the present context these principles require that a recipient have timely and adequate notice. . . ., and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Bell v. Burson, 402 U.S. 535, 541-2 (1971):

> The hearing required by the Due Process Clause must be meaningful and appropriate to the nature of the case. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard.

See Laing v. U. S., 423 U.S. 161, 186 (1976) (concurring opinion discussion of administrative due process requirement in tax proceeding):

> The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

In providing a taxpayer with inadequate notice in the 60-day letter and then deferring the right to a hearing until after expiration of the 60-day period allowed for establishing the taxpayer's case, it is submitted that the taxing authorities of the State of Ohio fail to satisfy the due process requirement of meaningful notice and hearing rights.

A second principle applicable in our case was recently enunciated by this Court.

Withrow v. Larkin, 421 U.S. 35, 58 (1975):

> Clearly, if the initial view of the facts based on evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.

In no previous case coming before this Court has it been necessary to apply this principle in order to reach a decision. Our case provides an important first instance for its appropriate application since the Ohio tax authorities' "initial view of the facts based on the evidence derived from nonadversarial processes"—during the 60-day period

and audit proceeding—"as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision", *i.e.*, the hearings held by the Tax Commissioner and, thereafter, the Board of Tax Appeals.

This Court, it should be noted, has consistently held that due process requirements of notice and hearing have application in state and local tax matters the same as in other administrative proceedings.

Central of Georgia Ry. Co. v. Wright, 207 U.S. 127, 138 (1907):

> Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require.

Londoner v. City of Denver, 210 U.S. 373, 385-6 (1908):

> [W]here the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice. . . . Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and if need be, *by proof*, however informal. (Emphasis added.)

Turner v. Wade, 254 U.S. 64, 70 (1920).

All of this Court's decisions cited in our Petition for Certiorari were cited in our briefs submitted to the Ohio courts but not a one was mentioned, much less discussed, in any state court decision. It was simply stated as a conclusory matter by the Court of Appeals that the hearings in our case satisfied due process despite the exclusion of Taxpayer's evidence, and that no hearing was required during the 60-days to which Taxpayer was restricted for submitting evidence. No attention was given to the adequacy of notice question by the Appeals Court.

CONCLUSION

Our case involves practices by state taxing authorities which, with state court approval, seek to minimize the meaningfulness and effectiveness of a taxpayer's notice and hearing rights in a tax assessment proceeding. By granting the petition for a writ of certiorari, this Court will be presented with an appropriate case for the analysis, development and application of sound principles of constitutional due process of law with respect to notice and hearing requirements in administrative proceedings.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated December 14, 1979)

No. 79-1353

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

GLOBE PAPER CO.,
Appellant,

vs.

EDGAR L. LINDLEY, Tax Commr.,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR REHEARING

(Dated December 14, 1979)

No. 79-1353

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

GLOBE PAPER CO.,
Appellant,

vs.

EDGAR L. LINDLEY, Tax Commr.,
Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

(Dated August 9, 1979)

No. 39092

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

GLOBE PAPER COMPANY,
Appellant,

vs.

EDGAR L. LINDLEY, Tax
Commissioner of Ohio,
Appellee.

APPEAL FROM BOARD OF TAX APPEALS

No. E-120

JOURNAL ENTRY AND OPINION

KRENZLER, *P.J.*:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Board of Tax Appeals and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Board of Tax Appeals is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

SEE OPINION, KRENZLER, P.J., ATTACHED HERETO AND INCORPORATED BY REFERENCE.

It is ordered that appellee(s) recover of appellant(s) his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Board of Tax Appeals to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ A. I. KRENZLER
Presiding Judge

JACKSON, J.,
CORRIGAN, J., concur

OPINION

SYLLABUS

1. Where a sale is claimed to be exempt from Ohio sales tax a vendor must obtain a timely exemption certificate from the consumer specifying the reason that the sale is not legally subject to the tax. This exemption certificate must be furnished or obtained within the period for filing the return for the period in which the sale was consummated; otherwise a presumption of taxability applies to the sale. R.C. 5739.03.

2. A vendor who does not obtain a timely exemption certificate from a consumer as provided for in R.C. 5739.03 may establish that a sale is not subject to sales tax if he presents evidence to the Commissioner sufficient to overcome the statutory presumption of taxability within sixty

days of giving of notice by the Commissioner of an intention to levy an assessment as provided for in R.C. 5739.03.

3. If a vendor fails to obtain a timely exemption certificate or fails to present sufficient evidence to the Tax Commissioner to establish that a sale is not subject to sales tax within sixty days of the giving of the notice by the Commissioner of an intention to levy an assessment, the sale is subject to the Ohio sales tax. Under these circumstances the vendor is precluded from introducing evidence as to the tax-exempt nature of the sales both at the hearing before the Commissioner on a petition for reassessment and on further appeal to the Board of Tax Appeals.

4. The provisions of R.C. 5739.03 affording a vendor the opportunity to prove exempt status of a sale by obtaining and furnishing a timely exemption certificate and an additional opportunity to establish exempt status within sixty days of the giving of notice of intention to levy an assessment, coupled with the provision for a hearing before the Tax Commissioner on a petition for reassessment pursuant to R.C. 5739.13, satisfy the requirements of due process. During the sixty-day period in which the vendor submits evidence to the Commissioner in order to establish the tax-exempt status of the sales in question, a hearing is not necessary to comport with the requirements of due process.

KRENZLER, *P.J.*:

In May, 1974, plaintiff-appellant Globe Paper Co., hereinafter referred to as appellant, was contacted by an agent of the State Department of Taxation who indicated that appellant was under consideration for an audit of sales made by appellant.

On June 11, 1974, appellant received an official notice of intention to levy a sales and use tax assessment from the State Department of Taxation. This notification, in the form of a sixty-day letter, essentially stated that upon preliminary examination of appellant's business records, it had been found that on certain sales appellant had either failed to collect the tax or obtain properly completed exemption certificates. The letter further stated that the certificates covering the sales must have been obtained during the filing period in which the sales were made, and if not so obtained, a presumption of taxability would apply. Appellant was advised that, although it had not obtained exemption certificates within the proper period, it would be given the opportunity to establish that the sales were not subject to the tax, but that this must be done within sixty days after receipt of the notice of intention to levy the assessment.

The letter further stated that the tax exempt status of any transactions in question could not be established by obtaining an exemption certificate during the sixty-day period, but that a written statement from the purchaser furnishing information as to how each item involved is used would be given consideration. The letter concluded with the statement that, upon expiration of the sixty-day period, an audit of appellant's business records would be conducted, and that those transactions not covered by valid exemption certificates already approved by a tax agent, or satisfactory statements from the purchasers establishing exemption, would be subject to the application of the tax.

As the appropriate information was not secured by appellant and submitted to the Tax Commissioner within the sixty-day period, the Tax Commissioner conducted an audit of sales made by appellant for the period from July 1, 1971, through June 30, 1974. On May 15, 1975,

the Tax Commissioner levied an assessment against appellant for sales tax, and on June 12, 1975, appellant filed a petition for reassessment.

On February 18, 1976, a hearing was held by the Tax Commissioner. The taxpayer did not present any evidence to establish the exempt status of the sales in issue. The Tax Commissioner held that the sales in issue were not exempt from sales tax and entered his order on February 18, 1976.

On March 18, 1976, appellant filed a notice of appeal with the Board of Tax Appeals from the Tax Commissioner's order of February 18, 1976. In the notice of appeal, appellant requested that the Board of Tax Appeals hear appellant's evidence establishing exemptions for all sales within the period in question. A hearing was held before the Board of Tax Appeals on July 27, 1976, at which time appellant requested permission to present fourteen color slides and actual exhibits of products sold by Globe Paper Co., in order to show that the products, by their very nature, were not subject to sales tax. *See* R.C. 5739.03(B). The Tax Commissioner objected to the introduction of such evidence on the ground that pursuant to the provisions of R.C. 5739.03, no evidence may be introduced after expiration of the sixty-day period. The Commissioner's objection was sustained.

Letters of usage obtained from some of appellant's customers during late spring and early summer of 1976 were proffered by appellant, as they had also been obtained after expiration of the sixty-day period, and were therefore excluded from consideration by the Board of Tax Appeals.

On January 31, 1978, the Board of Tax Appeals modified the final assessment of the Tax Commissioner. From

the order of the Board of Tax Appeals, appellant filed a notice of appeal with this court, presenting one assignment of error for our consideration:

> THE DEPARTMENT OF TAXATION'S PROCEDURES IN ASSESSING SALES TAXES AND PENALTIES IN EXCESS OF $225,000 WITHOUT PROVIDING NOTICE AND AN *EVIDENTIARY* HEARING DENIES TAXPAYER PROCEDURAL DUE PROCESS AS REQUIRED BY THE ADMINISTRATIVE PROCEDURE ACT (R.C. 119.01 *et seq.*) AND THE OHIO AND UNITED STATES CONSTITUTIONS.

In the case at bar, we are dealing with the procedure for obtaining a sales tax exemption for particular retail sales. As a general rule, it may be said that all retail sales are subject to an excise tax. Exceptions to this general rule are enumerated in R.C. 5739.01(E)(1) and R.C. 5739.02(B).

Where a sale is claimed to be exempt under R.C. 5739.-01(E) or certain provisions of R.C. 5739.02[1], the vendor must obtain an exemption certificate from the consumer, specifying the reason that the sale is not legally subject to the tax. R.C. 5739.03(B). This exemption certificate must be obtained within the period for filing the return for the period in which such sale was consummated. Otherwise, a presumption of taxability applies to the sale. R.C. 5739.03; *Union Metal Mfg. Co. v. Kosydar* (1974), 38 Ohio St. 2d 53.

For those vendors who fail to obtain exemption certificates within the specified period of time, a sixty-day extension period is provided, commencing from the time of the giving of notice by the Commissioner of intention

1. R.C. 5739.02(B)(12)-(25).

to levy an assessment, allowing the vendor an additional opportunity to establish the tax-exempt nature of the sale. R.C. 5739.03. During this sixty-day grace period, which is essentially an administrative proceeding extending the time during which a vendor may establish the exempt status of his sale, he must submit to the Commissioner evidence sufficient to overcome the statutory presumption of taxability set forth in R.C. 5739.03. Exemption certficates and other equivalent verification obtained within the sixty-day period are not sufficient to establish the exempt status of sales. Specific evidence as to the use of the items involved in the questioned transactions, such as affidavits, depositions, photographs, or videotapes of the property, to establish that the property is used in an exempt fashion, may be presented to overcome the presumption of taxability. *Union Metal Mfg. Co. v. Kosydar, supra,* footnote 3.

At the conclusion of the sixty-day period, if the questioned sales have not been established to the Commissioner's satisfaction as tax-exempt under R.C. 5739.02, the Commissioner may make an assessment against the vendor. R.C. 5739.13. Within thirty days after service of the notice of assessment, the vendor may file a petition for reassessment, setting forth the items objected to. Unless such a petition is filed, the assessment becomes conclusive.

When a petition for reassessment is filed, the vendor is afforded a hearing before the Tax Commissioner. R.C. 5739.13. It is at this quasi-judicial proceeding before the Tax Commissioner that the record is created on which to base a further appeal to the Board of Tax Appeals.

With regard to the nature of the evidence which may be presented at the hearing before the Tax Commissioner, the Ohio Supreme Court has held that where a vendor had neither obtained exemption certificates from customers,

nor established the exempt status of the sale within the sixty-day period provided for in R.C. 5739.03, at the hearing on the petition for reassessment, the Tax Commissioner's refusal to consider evidence obtained and furnished by the vendor after the conclusion of the sixty-day period is proper. *American Handling Equipment Co. v. Kosydar* (1975), 42 Ohio St. 2d 150. Thus, no evidence tending to establish exemption which was not gathered and offered by the vendor prior to or during the sixty-day grace period may be introduced at the hearing before the Tax Commissioner. *See also W.A. Storing Co. v. Porterfield, Tax Comm'r.* (1968, Franklin Cty.), 15 Ohio App. 2d 48. In other words, the vendor is bound by evidence gathered and submitted to the Commissioner within the sixty-day period and, therefore, is precluded from introducing any evidence not furnished during the sixty-day grace period.

In instances where the taxpayer submits the required information to the Tax Commissioner within the sixty-day period and the Tax Commissioner concludes that this information does not establish exempt status and proceeds with an assessment, the taxpayer who takes an appeal under R.C. 5739.13 may introduce evidence in regard to the tax-exempt status of the material sold for the purpose of creating a record for use in the event of further appeal. The fact that the Tax Commissioner did not accept the material submitted within the sixty-day period, nor consider it as sufficient evidence to establish tax-exempt status, does not preclude the taxpayer from introducing this material into evidence at the hearing provided for in R.C. 5739.13 in order to establish tax-exempt status. In addition to evidence of tax-exempt status which was submitted to the Commissioner within the sixty-day period, the vendor may introduce live witnesses to substantiate and

amplify the documentary evidence, explaining in detail how each of the alleged exempt products is used.

Obviously, where material furnished during the sixty-day period or prior thereto is determined by the Tax Commissioner to be sufficient to establish the exempt nature of a sale, an assessment against the vendor will not be made, obviating the necessity for a hearing before the Tax Commissioner on a petition for reassessment.

After notice of the findings of the Commissioner, the vendor or consumer may appeal from an assessment to the Board of Tax Appeals as provided in R.C. 5717.02. Such appeals shall be taken by the filing of a written notice with the Board and the Commissioner within thirty days after notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the Commissioner. Upon the filing of such notice of appeal, the Commissioner shall certify to the Board a transcript of the record of such proceedings before him, together with all evidence considered by him in connection therewith. The Board of Tax Appeals may order the appeal to be heard upon the record and the evidence certified to it by the Commissioner, but upon application of any interested party, the Board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it deems proper. R.C. 5717.02.

In the case at bar, both parties concede that any evidence tending to establish the exempt status of a sale must be submitted to the Commissioner at the latest within the sixty-day period following notice of intention to levy an assessment. However, the appellant contends that the method and manner of presenting evidence of exempt status of a sale should not be limited to the mere submission of documentary evidence, but that in addition, an evidentiary hearing including the opportunity to examine and cross-

examine witnesses should be conducted at a vendor's request during the sixty-day period. In the absence of such an evidentiary hearing, appellant argues that it has been denied due process.

It is the state's position, on the other hand, that the exemption certificates should have been obtained at the time of the transactions in question, or during the period for filing the return for the period in which the sales were consummated. The state argues further that because the sixty-day period is actually a point of advantage for the vendor in that it provides an extra period of time during which evidence of the exempt status of a sale may be submitted to the Commissioner, and because R.C. 5739.03 does not provide for a hearing, appellant's due process rights were not violated by the failure to afford it an evidentiary hearing during the sixty-day period.

It is our conclusion that the failure to provide for a hearing within the sixty-day period when evidence of tax-exempt status is presented by the taxpayer to the Commissioner under R.C. 5739.03 does not violate due process. A vendor is required to obtain and furnish an exemption certificate either at the time of the sale or during the period for filing the return for the period in which the sale is consummated. Further, the vendor has been given an additional sixty-day grace period from the time of giving of the notice by the Commissioner of an intent to levy an assessment in which to establish that the sale is tax-exempt. The statute makes no provision for a hearing during this sixty-day period. The vendor has available to him a variety of ways in which he may establish that the property is used in an exempt fashion; he may submit affidavits, depositions, photographs or videotapes of the property during the sixty-day period. Where a vendor does submit such information to establish tax-exempt status and the Tax Commissioner determines that the material submitted by the vendor during the sixty-day period is insufficient to establish exemption and makes an assessment against the vendor, the vendor is then afforded the opportunity for a hearing before the Commissioner on a petition for reassessment. It is at this hearing that the vendor will have an opportunity to present for the record all of the material in support of his position that the sales were tax-exempt. This is the only hearing provided for by statute and the only hearing required to satisfy due process. The taxpayer is thus afforded an opportunity to first present the material to the Tax Commissioner. If the Tax Commissioner is satisfied, the proceeding is terminated. If the Tax Commissioner is not satisfied and proceeds to make an assessment, the taxpayer may then file a petition for reassessment and participate in a hearing where evidence may be presented for the record to be made before the Commissioner and for use in further appeal. This satisfies the requirements of the statute as well as the requirements of due process.

A hearing before the Commissioner during the sixty-day period at which time the taxpayer may submit the information to establish tax exempt-status is required neither by the statute nor by the Constitutions of the United States or the State of Ohio.

A taxpayer who neither obtains and furnishes exemption certificates within the period for filing the return for the period in which such sale is consummated, R.C. 5739.03, nor submits evidence of tax-exempt status to the Commissioner within the sixty-day grace period, R.C. 5739.03, is precluded from presenting such material both at the hearing on petition for reassessment before the Commissioner and on further appeal to the Board of Tax Appeals.

In the present case, appellant failed to obtain and furnish exemption certificates for the sales in question within the period for filing the return for the period in which the sales were consummated required by R.C. 5739.03, and did not submit evidence of tax-exempt status to the Commissioner within the sixty-day grace period, also required by R.C. 5739.03. Thus, appellant was properly precluded from introducing such evidence both at the reassessment hearing before the Commissioner and at the Board of Tax Appeals.

Appellant's assignment of error is therefore overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

JACKSON, J.,
CORRIGAN, J., concur

ENTRY OF THE BOARD OF TAX APPEALS

(Dated January 31, 1978)

Case No. E-120

BOARD OF TAX APPEALS
STATE OF OHIO

GLOBE PAPER COMPANY,
Appellant,

vs.

EDGAR L. LINDLEY, Tax Commissioner of Ohio
Appellee.

(SALES TAX)
ENTRY

APPEARANCES:

For the Appellants—

Calfee, Halter & Griswold
By: Robert C. Stinson and
Michael D. Horlick
1800 Central National Bank Building
Cleveland, Ohio 44114

For the Appellee—

William J. Brown
Attorney General of Ohio
By: Clinton J. Miller III, Assistant
State Office Tower - 15th Floor
30 East Board Street
Columbus, Ohio 43215

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein

by the above named appellant under date of March 18, 1976, from a final order of the Tax Commissioner dated February 18, 1976, wherein that official modified a prior assessment made against the appellant. The body of said final order reads as follows:

"Vendor's License No. 18-003756

"The Tax Commissioner came to consider the above styled matter at a hearing scheduled thereon at Cleveland, Ohio, on October 7, 1975. James Goldsword, Vice-President of Globe Paper Co., Norman Nichol, C.P.A., with the firm of Ernst & Ernst, 1300 Union Commerce Bldg., Cleveland, Ohio, and Michael D. Horlick, Attorney at Law with the firm of Calfee, Halter & Griswold, 1800 Central National Bank Building, Cleveland, Ohio, appeared at said hearing.

"Now, being fully advised thereon, the Commissioner finds that:

"Assessee's objections to the amount of sales tax assessed are listed and disposed of as follows:

"Audit Period. Assessee contends the audit period should have ended April 30, 1974 as specified in the sixty day letter issued to assessee on June 11, 1974. This objection must be denied since by agreement of assessee dated December 31, 1974, the audit period was extended through June 30, 1974.

"Items Coded No. 1. Assessee contends such coded items were covered by properly executed exemption certificates on file at the time of the audit. This objection is well taken with respect to the following customers.

"E. G. Baldwin, Hillcrest Kiddies Prep School, Molded Fiberglass, Shaker Medical Center, Shaker

House Motor Hotel, Black & Decker, Mutual Display, Koby Photo, Advertising Services, S & S Merchandise, W. Elbrecht Meats, Stahl Metal Products, Washington Mint, and Block Printing. Tax on sales to the above amounts to $91.75. The balance of items coded No. 1 were not supported by properly executed exemption certificates.

"Items Coded No. 2. Assessee contends such items were exempt from tax by reason of the purchases holding direct pay permits issued by the Department of Taxation. Objection is allowed with respect to the following purchases.

"Otis Elevator Co., P. P. G. Industries, Uniroyal, Inc., J. C. Boehm Co., Brush-Wellman Co., Lear-Siegler, Inc., Kelvinator, S. K. Wellman Corp., Russell, Bursale & Ward, Inc., J. C. Virdon Lighting Co., and Cleveland Plumbing and Heating. Tax on sales to the above amounts to $530.37. No evidence was submitted to establish that the balance of the items so coded were covered by such direct pay permits.

"Items Coded No. 3. Assessee contends that such items were never subject to the tax because of the identity of the purchaser, and because of the fact the sales involved specialty products prepared to specifications for an identified non-taxable use. Objection without merit and is denied.

"Items Coded No. 4. Assessee contends the tax was paid by the consumer, namely Manners Restaurant, Inc. Objection denied, no such payment of tax has been made. Based on the above noted adjustments of tax in the amount of $91.75 and $530.37, assessee's basic sales tax liability is recomputed as follows:

Tax Charged (Test Period)	.....	$12,474.36
Tax Due Audit (ST-152's)	20,661.81	
Less Above Adjustments	622.12	
	.....	
		20,039.69
TOTAL Tax Due		$32,514.05

Total Tax Due $ 32,514.05 / Gross Sales (Test Period) $2,616,734.72 = 1.2425%

Gross Sales (Audit Period)	$25,541,433.17
	1.242%
Total Taxability	317,352.30
Less Credits	120,832.90
Unreported Tax Liability	$ 196,519.40

"The request for remission of the penalty is denied.

"Therefore, it is the order of the Tax Commissioner that this assessment shall stand as adjusted in the following amounts:

	Assessment	Penalty	Total
(Sales)	$196,519.40	$29,477.91	$225,997.31

"The law provides that the unpaid amount of tax shall bear interest at the rate of six percent per annum from June 14, 1975 to the date of payment."

From this final order the appellant prepared and filed its notice of appeal, which, in pertinent part, reads as follows:

"Pursuant to Section 5717.02, Ohio Revised Code, the taxpayer, The Globe Paper Company, Appellant herein, hereby gives written notice of its appeal to the Board of Tax Appeals from the final determination order of the Tax Commissioner dated February

18, 1976 and titled, In the Matter of Sales Tax Assessment, Serial No. 7511734.

"Notice of said order of the Tax Commissioner was given to the Taxpayer-Appellant by mail and was received on February 25, 1976. A true copy of said order (hereinafter referred to as the 'Order') is attached hereto as Exhibit 'A' and incorporated herein by reference.

"Appellant contends that said Order of the Tax Commissioner and the assessment pursuant thereto are erroneous, both in law and in fact, in the following respects:

"1. The Tax Commissioner erred in finding that an alleged agreement executed on December 31, 1974 was effective to extend retroactively the audit period beyond the audit period initially established in the Tax Commissioner's official Notice of Intent to Levy a Sale and Use Tax Assessment dated June 11, 1974 attached hereto as Exhibit 'B' and incorporated herein by reference (hereinafter called the 'Sixty-Day Letter').

"2. The Tax Commissioner erred in denying certain of appellant's objections to the items Coded No. 1 and referred to in the Order, since timely executed exemption certificates on file at the time of the audit were ignored.

"3. The Tax Commissioner erred in denying certain of Appellant's objections to the items Coded No. 2 and referred to in the Order, since direct pay permits covering customers of Appellant were ignored by the Tax Commissioner.

"4. The Tax Commissioner erred in refusing to accept evidence tendered by the Appellant pursuant to

the last paragraph of Section 5739.03, Ohio Revised Code in connection with Appellant's sales Coded No. 3 and referred to in the Order, because the same were sales wherein the identity of the consumer was such that the transaction was never subject to the tax imposed or wherein the item of tangible personal property sold was never subject to the tax imposed regardless of use.

"5. The Tax Commissioner erred in finding that no sales tax had been paid by the consumer, Manners Restaurant, Inc., in connection with items Coded No. 4 referred to in the Order and, therefore, the assessment issued to Appellant with respect thereto may be precluded by Section 5739.13, Ohio Revised Code.

"6. The Tax Commissioner erred in failing to find that Section 5739.03 of the Ohio Revised Code is unconstitutional in that it does not provide due process of law as required by both the Ohio and the Federal Constitutions relative to notice, hearing or the opportunity to be heard before a competent tribunal prior to the time the tax became irrevocably fixed.

"7. The Tax Commissioner erred in failing to find that his procedures as applied to this Appellant were unconstitutional in that said procedures do not provide due process of law as required by both the Ohio and Federal Constitutions relative to notice, hearing and the opportunity to be heard before a competent tribunal prior to the time the tax became irrevocably fixed, and further that said procedures failed to comply with the requirements of Section 5739.03 of the Ohio Revised Code in that Appellant was prevented from establishing that its sales were not subject to the tax imposed by means other than 'letters of usage'.

"8. The Tax Commissioner erred in failing to find that the Commissioner's procedures as applied to this Appellant do not comply with the statutory requirements of the Ohio Administrative Procedure Act, Chapter 119, Sections 119.01 through 119.13, inclusive, of the Ohio Revised Code.

"9. The Tax Commissioner erred in failing to find that the manner in which the audit of Appellant's return including the audit procedures, the Sixty-Day Letter, the alleged Agreement of December 31, 1974, the statements, and other actions of the Commissioner's agents, were arbitrary, capricious and contrary to the law.

"10. The Tax Commissioner erred in his denial of the Appellant's request for remission of penalty imposed.

"WHEREFORE, Appellant prays that the Tax Commissioner, pursuant to Section 5717.02, Ohio Revised Code, certify to the Board of Tax Appeals a transcript of the proceedings before him, together with all evidence considered by him in connection therewith; that the Board of Tax Appeals hear Appellant's evidence establishing exemptions for all sales within the period in question; that the Board of Tax Appeals afford Appellant a notice and hearing that complies with the requirements of the Ohio Administrative Procedure Act and the due process provisions of both the State and Federal Constitutions; in the alternative, that the Board of Tax Appeals hold that the Tax Commissioner's Order be invalidated; that the sales tax assessment be cancelled; that the penalty be remitted in full; and that Appellant be afforded any and all other relief from the aforesaid Order of the Tax Commissioner to which Appellant may be entitled."

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, the testimony and evidence presented at a record hearing before the Board of Tax Appeals in Columbus, Ohio, on July 27, 1976, and the briefs submitted by counsel.

The appellant is an Ohio corporation which distributes paper products. An agent of the Tax Commissioner contacted appellant in May of 1974, reviewed appellant's file of exemption certificates and compared that file with appellant's general ledger. The agent did not find exemption certificates for all sales upon which sales tax was not collected.

The agent then delivered to the appellant a notice of intention to levy a sales tax assessment (commonly referred to as a 60-day letter) which letter was received by appellant's Vice President on June 16, 1974.

Following receipt of the 60-day letter, the appellant had new exemption certificate forms printed and mailed them to customers with a covering letter asking that the exemption certificates be completed, signed and returned.

The agent of the Tax Commissioner testified at the hearing before the Board of Tax Appeals that he advised appellant that certificates of exemption would not suffice once the 60-day letter was delivered and the 60-day letter itself states that exemption certificates may not be obtained at this time.

There is conflicting testimony as to what transpired when the agent of the Tax Commissioner returned to check on appellant's progress shortly before the end of the period established by the 60-day letter. At that time the agent observed that appellant was securing certificates of exemption from its customers. The agent indicated to the

appellant that he thought it was good policy but said no more at that point as to the requirement for letters of usage as opposed to certificates of exemption.

The evidence was clear that during the sixty-day period following delivery of the 60-day letter, the appellant did not procure or attempt to procure letters of usage but did request and secure many new certificates of exemption from its customers.

When the agent returned to commence the audit, it appeared that about 200,000 invoices would have to be reviewed for the entire audit period. After consulting with the appellant, it was mutually agreed between the appellant and the agent that a three-month period of the appellant's choosing would be audited and extrapolated over the enitre audit period. The audit period covered by said agreement was the same as that covered by the assessment, but is longer by two months (May and June of 1974) than the period covered by the sixty day letter.

At the hearing, the appellant offered and later proffered a number of affidavits representing testimony concerning the uses of property sold by the appellant.

Other testimony concerning usage was also excluded as being outside the 60-day period.

However, it was made clear to the appellant that if the appellant desired a continuance to procure evidence concerning the two months outside the period set forth in the 60-day letter that such continuance would be granted but appellant declined such continuance.

There are certain matters raised by appellant in its notice of appeal which the Tax Commissioner concedes and they are as follows:

Appellant put into evidence a paid assessment against Manners Restaurants (Ex. 5) which it alleged covered the same transactions as the current assessment against appellant. Appellant submitted materials after the hearing (*Brief of Appellant* Ex. A) showing said transactions on the audit sheets of the current assessment. Upon review by the Commissioner, it was revealed that Exhibit 5 was based on a *sales* audit. Nevertheless, the Commissioner located the appropriate Manners assessment based on a *purchase* audit and verified appellant's claim regarding its sales to Manners. Therefore, the Tax Commissioner has consented to a modification of his final order to delete the $3,296.28 of taxable sales made to Manners as shown in *Brief of Appellant,* "Exhibit A" from the test period involved herein.

Further, the Tax Commissioner has consented to the following reductions in taxable sales per the test period for exemption certificates and direct pay permits allowed in his final order (ST. 132-33), but missed when the audit sheets were reviewed (ST. 139-40).

Exemption Certificate		
Molded Fiber Glass	ST. 19, l. 21	99.96
Direct Pay Permits		
Cleveland Plumbing & Heating	ST. 31, l. 2	42.35
Kelvinator	ST. 23, l. 15	1,362.27
	ST. 88, l. 12	221.76
	ST. 88, l. 11	3,720.00
Lear-Siegler	ST. 23, l. 22	50.00
Uniroyal	ST. 105, l. 20	45.00
	ST. 122, l. 13	107.20
		$5,648.54

The combination of the above modifications results in an adjustment downward of taxpayer's basic tax liability of $3,933.38, computed in the following manner:

Tax Charged (Test Period)		$12,474.36
Tax Due Audit [as adjusted in (Test Period) the final order (ST. 133)]		20,039.69
		32,514.05
Less $3,296.28+$5,648.54=$8,944.82		-402.52
	x .045 (Tax Rate)	
	$ 402.52	
TOTAL Tax Due (Test Period)		$32,111.53

$$\frac{\text{Total Tax Due (Test Period)}}{\text{Gross Sales (Test Period)}} \quad \frac{\$32{,}111.53}{\$2{,}616{,}734.72} = 1.2271\%$$

Gross Sales (Audit Period)	$25,541,433.17	
	x .012271	
Total Tax Liability	$ 313,418.92	
Less Credits	120,832.90	
Unreported Tax Liability	$ 192,586.02+15% Penalty	

The Tax Commissioner was unable to verify that Richardson, Inc. or Richardson Limited, Inc. does business as the Washington Mint. Vendor's License No. 18-323700 under which the Blanket Certificate of Exemption was given (ST. 161) is held by "The Washington Mint, Inc." Therefore, the Commissioner did *not* consent to a reduction in taxable sales for those sales listed at ST. 16, lines 10-12 ST. 58, lines 8-9.

Similarly, the Tax Commissioner was unable to find a direct pay permit issued to R.B.&W. or Bolt & Nut Co. Hence, he did not consent to a reduction in taxable sales for the sale listed at ST. 16, line 5.

A major portion of this case is based on the fact that the appellant first did not have proper exemption certificates for all its claimed exempt sales. Then after receiving a 60-day letter instead of attempting to procure letters of usage which might well qualify many of its sales for exemption, it attempted to secure new exemption certificates from its customers.

It has been clearly held that after the 60-day letter has been received by the taxpayer, as here, that new exemption certificates are insufficient to establish exception or exemption (*Union Metal Mfg. Co. v. Kosydar* (1974) 38 Ohio St. 2d 53) and no evidence may be introduced outside the sixty-day period to establish exception or exemption. See *Dayton Sash & Door Co. v. Kosydar* (1973) 36 Ohio St. 2d 120.

The alleged errors set forth in appellant's notice of appeal will hereinafter be disposed of in the order set forth in the notice of appeal.

1. The agreement of December 31, 1974, which provided for the use of a three month period to be chosen by the appellant with the results to be extrapolated over the entire audit period was clear-cut and appellant did choose the three-month period. This procedure in lieu of checking approximately 200,000 invoices was of mutual benefit to the agent and the appellant.

The fact that this agreement extended the period set forth in the 60-day letter was agreed to by the appellant. Further the appellant was offered an opportunity at the hearing to have a continuance of the hearing for the purpose of developing any necessary proof or evidence concerning transactions during that extra two months but appellant, through counsel, declined such continuance.

It is therefore the finding of the Board of Tax Appeals that appellant's alleged error No. 1 is without merit.

2. It is the finding of the Board of Tax Appeals that appellant produced no proof that timely executed exemption certificates on file at the time of the audit were ignored other than those for the customers set forth in the disposition of Items Coded No. 1 in the final order of the Tax Commissioner and for which credit in the amount of $91.75 tax has been given in said final order save for one certificate from Molded Fiberglass covering taxable sales of $99.96.

Therefore, appellant's alleged error No. 2 is without merit except for the Molded Fiberglass concession.

3. As to the question of credit for direct pay permits, the Tax Commissioner has again searched his records and consents to credit of sales as follows: Cleveland Plumbing & Heating, Kelvinator, Lear-Siegler & Uniroyal for taxable sales of $5,648.54. Beyond these items no proof of direct pay permits was presented and the third alleged error is without merit except as set forth in this item.

4. It is contended here that the Tax Commissioner refused to accept evidence where appellant claimed the personal property sold was never subject to the tax. However, appellant offered no such proof and the items sold were such that it depended on the use to which such items were put by the purchaser and this use therefore brought these items under Revised Code Section 5739.03 wherein proof of usage was necessary if proper exemption certificates were not on hand for the audit.

Therefore the fourth alleged error is without merit.

5. The fifth alleged error was researched by the Tax Commissioner after the hearing and while it was appellant's contention that the tax on the Manner's account had been paid as claimed under exhibit 5, it developed that exhibit 5 was based on a *sales* audit. However, as set forth supra

under concessions by the Tax Commissioner, the Tax Commissioner located the appropriate assessment based on a *purchase* audit and verified appellant's claim as to the Manner's transactions in the amount of $3,296.28 of taxable sales.

6 and 7. It is appellant's contention that Revised Code Section 5739.03 is unconstitutional as to the Ohio and Federal Constitutions in that the statute and its application do not and did not provide due process to the appellant.

It is well settled that the Board of Tax Appeals is without authority to determine the constitutionality of statutes on their face or as applied. See *Steward v. Evatt* (1944), 143 Ohio St. 547 and *S. S. Kresge v. Bowers* (1960), 170 Ohio St. 405.

It is therefore the finding of the Board of Tax Appeals that it is without authority to consider Nos. 6 and 7.

8. Appellant's alleged error number eight claims that Chapter 119 of the Revised Code applies to the issuance of the 60-day letter and since no opportunity for hearing was accorded to the appellant before issuing the 60-day letter, that the letter is invalid under Revised Code Sections 119.06 and 119.07.

It is the finding of the Board of Tax Appeals that since no adjudication of the rights of appellant are determined by the issuance of the 60-day letter that such sections do not apply to this action and as such, alleged error No. 8 is without merit.

9 and 10. It is the finding of the Board of Tax Appeals that the testimony and evidence as presented by both parties fails to establish any actions of the Tax Commissioner which were arbitrary, capricious or contrary to law. In fact, the Tax Commission bent over backwards to assist

appellant in proving certain portion of its claim by researching other records after the hearing. As such the alleged errors Nos. 9 and 10 are without merit.

Giving consideration to the facts, the statutes, the case law and the consent to modification by the Tax Commissioner, it is the decision of the Board of Tax Appeals that the final assessment of the Tax Commissioner be modified by reducing said assessment to $192,568.02 plus the 15% penalty thereon with the computation as set forth supra under concessions of the Tax Commissioner and as modified such final order must be and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/s/ [signature illegible]
Chairman

lah

JOURNAL ENTRY OF THE STATE OF OHIO
DEPARTMENT OF TAXATION

(Dated February 18, 1976)

STATE OF OHIO
DEPARTMENT OF TAXATION

IN THE MATTER OF SALES TAX
ASSESSMENT, SERIAL NO. 7511734

Globe Paper Co.
1506 Superior Ave.
Cleveland, Ohio 44114

Vendor's License No. 18-003756

JOURNAL ENTRY

The Tax Commissioner came to consider the above styled matter at a hearing scheduled thereon at Cleveland, Ohio, on October 7, 1975. James Goldsword, Vice-President of Globe Paper Co., Norman Nichol, C.P.A., with the firm of Ernst & Ernst, 1300 Union Commerce Bldg., Cleveland, Ohio, and Michael D. Horlick, Attorney at Law with the firm of Calfee, Halter & Griswold, 1800 Central National Bank Building, Cleveland, Ohio, appeared at said hearing.

Now, being fully advised thereon, the Commissioner finds that:

Assessee's objections to the amount of sales tax assessed are listed and disposed of as follows:

Audit Period. Assessee contends the audit period should have ended April 30, 1974 as specified in the sixty

day letter issued to assessee on June 11, 1974. This objection must be denied since by agreement of assessee dated December 31, 1974, the audit period was extended through June 30, 1974.

Items Coded No. 1. Assessee contends such coded items were covered by properly executed exemption certificates on file at the time of the audit. This objection is well taken with respect to the following customers.

E. G. Baldwin, Hillcrest Kiddies Prep School, Molded Fiberglass, Shaker Medical Center, Shaker House Motor Hotel, Black & Decker, Mutual Display, Koby Photo, Advertising Services, S & S Merchandise, W. Elbrect Meats, Stahl Metal Products, Washington Mint, and Block Printing. Tax on sales to the above amounts to $91.75. The balance of items coded No. 1 were not supported by properly executed exemption certificates.

Items Coded No. 2. Assessee contends such items were exempt from tax by reason of the purchases holding direct pay permits issued by the Department of Taxation. Objection is allowed with respect to the following purchases.

Otis Elevator Co., P. P. G. Industries, Uniroyal, Inc. J. C. Boehm Co., Brush-Wellman Co., Lear-Siegler, Inc., Kelvinator, S. K. Wellman Corp., Russell, Bursale & Ward, Inc., J. C. Virden Lighting Co., and Cleveland Plumbing and Heating. Tax on sales to the above amounts to $530.37. No evidence was submitted to establish that the balance of the items so coded were covered by such direct pay permits.

Items Coded No. 3. Assessee contends that such items were never subject to the tax because of the identity of the purchaser, and because of the fact the sales involved

specialty products prepared to specifications for an identified non-taxable use. Objection without merit and is denied.

Items Coded No. 4. Assessee contends the tax was paid by the consumer, namely Manners Restaurant, Inc. Objection denied, no such payment of tax has been made. Based on the above noted adjustments of tax in the amount of $91.75 and $530.37, assessee's basic sales tax liability is recomputed as follows:

Tax Charged (Test Period)	.....	$12,474.36
Tax Due Audit (ST-152's)	20,661.81	
Less Above Adjustments	622.12	
	.....	20,039.69
TOTAL Tax Due		$32,514.05

Total Tax Due	$ 32,514.05	= 1.2425%
Gross Sales (Test Period)	2,616,734.72	
Gross Sales (Audit Period)		$25,541,433.17
		1.2425
Total Taxability		317,352.30
Less Credits		120,832.90
Unreported Tax Liability		$ 196,519.40

The request for remission of the penalty is denied.

Therefore, it is the order of the Tax Commissioner that this assessment shall stand as adjusted in the following amounts:

	Assessment	Penalty	Total
(Sales)	$196,519.40	$29,477.91	$225,997.31

The law provides that the unpaid amount of tax shall bear interest at the rate of six percent per annum from June 14, 1975 to the date of payment.

/s/ EDGAR L. LINDLEY
EDGAR L. LINDLEY
Tax Commissioner

I hereby certify the foregoing to be a true and correct copy of the action of the Tax Commissioner taken this day with respect to the above matter.

/s/ EDGAR L. LINDLEY
EDGAR L. LINDLEY
Tax Commissioner

OFFICIAL NOTICE OF INTENTION TO LEVY A SALES AND USE TAX ASSESSMENT

(Dated June 11, 1974)

STATE OF OHIO
DEPARTMENT OF TAXATION

Perry-Payne Building
740 Superior Avenue, N.W., Cleveland, Ohio 44113

Globe Paper Co.
1506 Superior Ave.
Cleveland, Ohio 44114

Gentlemen:

OFFICIAL NOTICE OF INTENTION TO LEVY
A SALES AND USE TAX ASSESSMENT

In making a preliminary examination of your business records it has been found that on certain sales you failed to collect the tax or obtain properly completed exemption certificates. Therefore, you are hereby notified under the provisions of Section 5739.03 of the Ohio Revised Code of the intention of the Tax Commissioner to levy an assessment against you for any sales or use tax found due as the result of an audit to be conducted on your business for the period from July 1, 1971 thru April 30, 1974 Inclusive.

The sales tax law requires a vendor to obtain an exemption certificate on any sale where exemption is claimed except sales where the item sold is never subject to the tax or where the purchaser is never subject to the tax. The certificate covering the sale must have been obtained during the filing period in which the sale was made. If the certificate was not obtained within the specified period, it is presumed that the tax applies.

The law further provides, however, that even though the vendor has not obtained a certificate within the proper period, he shall be given the opportunity of establishing that the sale was not subject to the tax, but this must be done within sixty days after receipt of the notice of intention to levy the assessment. This period is fixed by law and cannot be extended.

Therefore, you have sixty days in which to establish that any sales not already covered by valid exemption certificates are not subject to the tax. This cannot be done by obtaining an exemption certificate at this time. A written statement from the purchaser furnishing information concerning exactly how each item involved is used will be given consideration. It is your responsibility to secure this information within the sixty day period. Information received after that time cannot be considered or allowed to establish proof of exemption.

Upon expiration of the sixty day period we will proceed with our audit of your business records and those transactions not covered by the valid exemption certificates already approved by our agent or satisfactory statements from the purchasers establishing exemption, will be subject to the application of the tax.

Very truly yours,

/s/ Amil Gallitto
Amil Gallitto, Manager
Cleveland District Office

OHIO REVISED CODE

§ 5717.02 [Appeals from final determinations; procedure; hearing.]

Appeals from final determinations by the tax commissioner or the commissioner of tax equalization of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by either commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by either commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue.

Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if his action is the subject of the appeal, or with the commissioner of tax equalization if his action is the subject of the appeal, within thirty days after notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by either commissioner has been given or otherwise evidenced as required by law. The notice of such appeal may be filed in person or by certified mail. If the notice of such appeal is filed by certified mail, the date of the United States postmark placed on the sender's receipt by the postal employee to whom the notice of appeal is presented shall be treated as the date of filing. The notice of appeal shall set forth, or have attached thereto and incorporated therein by reference, a

true copy of the notice sent by such commissioner to the taxpayer of the final determination complained of, and shall also specify the errors therein complained of.

Upon the filing of such notice of appeal the tax commissioner or the commissioner of tax equalization shall certify to the board a transcript of the record of such proceedings before him, together with all evidence considered by him in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by such commissioner, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper.

§ 5739.02 Levy of tax; purpose; rate; exemptions.

* * * * *

(B) The tax does not apply to the following:

* * * * *

(15) Sales to persons engaged in any of the activities mentioned in division (E)(2) of section 5739.01 of the Revised Code, of packages, including material and parts therefor, and of machinery, equipment, and material for use in packaging tangible personal property produced for sale, or sold at retail. Packages include bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, and "packing" means placing therein;

* * * * *

§ 5739.03 Consumer to pay tax; collection and reporting of tax by vendor; exemption certificates.

Except as provided in section 5739.05 of the Revised Code, the tax imposed by or pursuant to section 5739.02 or 5739.021 [5739.02.1] of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale, in the manner and at the times provided as follows:

(A) If the price is, at or prior to the delivery of possession of the thing sold to the consumer, paid in currency passed from hand to hand by the consumer or his agent to the vendor or his agent, the vendor or his agent shall collect the tax with and at the same time as the price;

(B) If the price is otherwise paid or to be paid, the vendor or his agent shall, at or prior to the delivery of possession of the thing sold to the consumer, charge the tax imposed by or pursuant to section 5739.02 or 5739.021 [5739.02.1] of the Revised Code to the account of the consumer, which amount shall be collected by the vendor from the consumer in addition to the price. Such sale shall be reported on and the amount of the tax applicable thereto shall be remitted with the return for the period in which the sale is made, and the amount of the tax shall become a legal charge in favor of the vendor and against the consumer.

If any sale is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, with the exception of divisions (B) (1) to (B) (11), inclusive, of section 5739.02, the consumer must furnish to the vendor, and the vendor must obtain from the consumer, a certificate specifying

the reason that the sale is not legally subject to the tax. If the transaction is claimed to be exempt under division (B) (13) of section 5739.02 of the Revised Code, the exemption certificate shall be signed by both the contractor and his contractee and such contractee shall be deemed to be the consumer of all items purchased under such claim of exemption in the event it is subsequently determined that the exemption is not properly claimed. The certificate shall be in such form as the tax commissioner by regulation prescribes. If no certificate is furnished or obtained within the period for filing the return for the period in which such sale is consummated, it shall be presumed that the tax applies. The failure to have so furnished, or to have so obtained, a certificate shall not prevent a vendor or consumer from establishing that the sale is not subject to the tax within sixty days of the giving of notice by the commissioner of intention to levy an assessment, in which event the tax shall not apply.

Certificates need not be obtained nor furnished where the identity of the consumer is such that the transaction is never subject to the tax imposed or where the item of tangible personal property sold is never subject to the tax imposed, regardless of use, or when the sale is in interstate commerce.